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Regarding applicant's dependent claims, Musher also does not teach of an ingredient in a support that comprises a material comprising two ingredient materials, as all of Musher's ingredients are raw ingredients, not ingredient materials. He does not teach of a support comprising a composite material, as he teaches away from using a composite material, as above. He does not teach of a non frozen support that has a material comprising two ingredient materials for at least the reason that his support is entirely frozen. Musher does not teach of a single component composite material confection bar since his framework/support comprises many components. He does not teach of any two ingredient materials in a single material, as above, and as such clearly does not include any of applicant's two confections in such a material. Musher does not further add ingredients, or ingredient materials to such a support, as he does not teach of such a material at all. Musher does not teach of a handle comprising a material comprising two ingredient materials or a composite material, as his handle is only a single ingredient material of baked stick. He does not teach of adding anything, such as ice cream, or a component, such as a lollipop, or a composite material component (Nestle Bites) to such a non frozen support comprising a composite material or a single material comprising two ingredient materials.

In accordance with MPEP 707.07(f) Answer All Material Traversed [R-3] recites:

In order to provide a complete application file history and to enhance the clarity of the prosecution history record, an examiner must provide clear explanations of all actions taken by the examiner during prosecution of an application.

Where the requirements are traversed, or suspension thereof requested, the examiner should make proper reference thereto in his or her action on the amendment.

Where the applicant traverses any rejection, *the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it.*

The importance of answering applicant's arguments is illustrated by *In re Herrmann*, 261 F.2d 598, 120 USPQ 182 (CCPA 1958) where the applicant urged that the subject matter claimed produced new and useful results. The court noted that since applicant's statement of advantages was not questioned by the examiner or the Board of Appeals, it was constrained to accept the statement at face value and therefore found certain claims to be allowable. See also *In re Soni*, 54 F.3d 746, 751, 34 USPQ2d 1684, 1688 (Fed. Cir. 1995) (Office failed to rebut applicant's argument).

Applicant claims do not recite: "a support comprising two ingredient materials," but recites: a support comprising *a material* comprising two ingredient materials or a support comprising a composite material.

Examiner has not proven a prima facie case of anticipation for applicant's claims as set forth in the claims. A mere conclusory statement that since Musher has at least two ingredient materials that are combined together to make the support as "as instantly claimed," is insufficient for a prima facie case of anticipation. A mere conclusory statement that Musher teaches of a support comprising two ingredient materials and also composite material thus the claim is anticipated is insufficient for a prima facie case of anticipation. Therefore, in the absence of such an argument, or factual evidence to the contrary, it is then to be understood that applicant's claims have *not* been anticipated by the cited reference to Musher, as 707.07(f) recites above, or any reference, and is therefore allowed. This omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to Applicant. (See MPEP § 706.07(a)). Applicant therefore respectfully requests reconsideration. All claims should be allowed.

**Applicant's Claims Recite Novel Features and So Distinguish  
Over Feybusch Under Section 102**

The Examiner has rejected the claims under 35 USC 102(b) as being anticipated by Feybusch (US 1638480). The Examiner has stated that Feybusch teaches edible cones for the support of frozen confections such as ice creams or sundae, i.e., edible support. The support or cone taught by Feybusch comprises of two ingredient materials, i.e., cone making pastry material (such as sugar flour etc) and edible adhesive material, such as molasses, and popcorn or nuts or brittle or puffed rice, as instantly claimed. The ingredients sugar, water and flour etc., that are typical ingredients of the pastry cone (i.e., support for a frozen comestible) as taught by Feybusch comprises an ingredient in the support as recited in claim 349.

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Applicant's claim 349 recites: A support for a frozen comestible comprising a material comprising two edible ingredient materials. Claim 360 recites: A support for a frozen comestible comprising an edible composite material.

Applicant's claims 349, 360, and all claims clearly distinguish over the support of Feybusch, as Feybusch does not show a material comprising two edible ingredient materials, or an edible composite material.

**N.B. Finality of the Next Action Is Precluded** Although the Summary of the past Office Actions indicates that claims 349-369 stand rejected, *the Detailed Actions omit any explanation of how any cited art anticipates these claims*. Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and *the burden to rebut this "rejection" has not yet shifted to the Applicant*. Consequently, a next Office Action rejecting claim 349-383 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP § 706.07(a)).

Examiner relies upon an edible assembly of Feybusch that has *distinct materials*, each of which has only one ingredient material. Examiner has however not stated *which one* of Feybusch's distinct materials comprises two ingredient materials or a composite material. "A composite material" is a well known term, especially to one skilled in the art of making edible supports and confections. One skilled in the art clearly knows that "an edible assembly" is not evidence of the existence of "a composite material." Broadly stating that Applicant's composite material is anticipated by "cone making pastry material (such as sugar flour etc) and edible adhesive material, such as molasses, and popcorn or nuts or brittle or puffed rice, as instantly claimed," is moot. (Pg. 10, Para. 3) Reciting ingredients, or components, and mere conclusory statements, such as "as instantly claimed" is not sufficient and is not factual evidence of anticipation. A myriad of inventions comprise a combination of these ingredients, or their equivalents. Examiner has not

shown any factual evidence that Feybusch teaches anything more than distinct components, or parts of an assembly. There is no evidence or factual teachings that the cited art intended to make and then actually made a material that had a synergism of a composite material, or a single material comprising two ingredient materials. The prior art designers had not thought to make a composite material for a support for a frozen comestible. Examiner over the course of *eight years* has yet to disclose applicant's features, and in the manner claimed. An assembly comprising two edible components does not anticipate, or address the merits of applicant's invention. This omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to Applicant. (See MPEP § 706.07(a)).

Examiner broadly states that since Feybusch teaches of edible cone material and molasses, popcorn or nuts or brittle, combined together to make the support and therefore applicant's claims are anticipated. This similar argument is also moot. (See patent of Musher in view of Feybusch) Many edible assemblies are made having these ingredients or similar ingredients, such as an elaborate Victorian gingerbread house, which has many pieces of gingerbread attached together, such as the front, back, sides, roof, chimney, porch pieces..., plus candies and cookies for decoration. Although this house has many materials put together, it does not comprise a composite material, nor a material comprising two ingredient materials. None of Feybusch's materials comprise anything more than raw ingredients. Attaching distinct components together to make an edible assembly, as suggested by examiner, does not anticipate applicant's independent claims, as written, which particularly points out applicant's invention. Examiner has yet to show any factual evidence of anticipation, as required by law, or any legal ground for rejection.

If Feybusch were indeed to have "composite materials," as Examiner suggests, he would have three distinct components each comprising two ingredient materials. He does not. Each of his "distinct components" has only *raw ingredients*. Examiner has acknowledged that Feybusch's comprise of "distinct components, such as, pastry cone ingredients, molasses, popcorn, peanuts or puffed rice or nut brittle" pg 10,16 of OA discussion of claim 238). Those skilled in the art know that usual pastry cone has only one ingredient material, baked dough and is not a composite

material. Molasses also has only one ingredient material, boiled sugar. Popcorn and nuts have only one ingredient material. Nut brittle is a hard crack boiled candy, boiled at the highest of boiled candy temperatures without burning, with all ingredients included, and is only a single ingredient material, (see nut brittle below.) Therefore Feybusch does not teach of a composite material, or a support comprising a material comprising two ingredient materials. Thus, this omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant. (See MPEP § 706.07(a))

### **Feybusch Teaches Away From Including a Composite Material**

In addition to Feybusch showing only materials that each has only raw ingredients, Feybusch teaches away from using a composite material. Feybusch teaches: "Furthermore after the cones are filled with ice cream, the melting of the cream, due largely to the heat from the consumer's hand, causes the pastry to become soaked; the pastry becoming a sodden pulpy mass, the exterior of which is wet and sticky." (Page 1, col. 1, lls. 8-14) "Due to the irregular configuration of the outer popcorn envelope, any liquid which might trickle down the exterior wall of the cone *will pass between the crevices formed between adjacent pieces of popcorn* and therefore will not soil the hand of the user." (Page 1, col. 2, lls. 82-87)

Feybusch needs many voids, cracks, or crevices in the material to provide a mess guard to the user, the reason for his invention. When using a composite (solid) material, the melting ice cream would have no where to go except back onto the hands of the user, and render the invention of Feybusch useless. Therefore Feybusch teaches away from using a composite material. See Britannica online encyclopedia, definitions, straw and mud bricks, etc., above.

**[Pea]nut Brittle:** <http://video.about.com/candy/Peanut-Brittle.htm>  
[http://www.reference.com/browse/wiki/Brittle\\_\(food\)](http://www.reference.com/browse/wiki/Brittle_(food))

### **Feybusch Teaches Away From Having Two Ingredient Materials in the Same Material**

Claim 349 recites: A support for a frozen comestible comprising a material comprising two edible

ingredient materials.

Feybusch teaches away from having two ingredient materials in the same material. (The invention must be evaluated for what it teaches as a whole). Feybusch teaches three "distinct" materials, cone, molasses, and popcorn. There are no teachings that Feybusch would isolate the three ingredient materials into the upper portion of the cone within the material, so as to have both three ingredient materials in the upper part of the cone and only one in the lower portion of the cone so the cone will properly fit into the paper carton. (See Figures 3, 6) There is also the risk if the pastry, molasses, and popcorn were in the same material, that the molasses would well seep into the crevices of the popcorn making it impossible for the popcorn to drain away melted ice cream. Additionally, in an alternate method: placing the three materials together in the cone would render only one ingredient when baked, which must be completed, i.e. baked cone. All of his embodiments factually teach of three separate materials, each material comprising only one ingredient material for doing three different tasks, i.e. the cone for support, the molasses for glue and moisture resistance, and the popcorn with crevices to drain away melted ice cream. Feybusch teaches away from both a support comprising a material comprising two ingredient materials, and a support comprising a composite material.

TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). >"

Examiner has not done this.

In addition, Applicant's novel material *can provide strong synergistic strength* within the support itself, (not parts that hang off of a single ingredient material support, i.e. Musher, Feybusch which may make it stressed and weaker) all within a single material, where the combined effect is greater i.e. stronger, than the sum of their individual effects. Applicant's support can be in any shape, size, texture, flavors, ingredient materials, thickness, or dimension. Musher is relegated to a frozen confection on a stick, having only the ice cream choice of the manufacturer, and Feybusch is relegated to an ordinary pastry cone. Applicant's support can provide more than one taste, or

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texture in a single material for a non frozen support for ease of manufacturing, which provides a crispy support, or a supple chewy support, or a combination chewy and crispy support, as desired, for different applications, or choices. Applicant also provides a composite material handle, a composite material bite size ingredient, many novel pairs of ingredient materials, a single material support comprising layered ingredient materials, mixed ingredient materials, concentric ingredient materials, a composite material candy bar, and furthermore a frozen confection supported on this specialized material. These are additional novel features that also add patentable material, which Musher, Feybusch and the cited references do not have. Neither the supports of Musher or Feybusch, nor any art known to applicant, contain Applicant's strong supporting synergism, or versatility in a support for a frozen comestible.

Therefore applicant submits that applicant's support is both novel and unobvious over Musher and Feybusch and all other known references and respectfully submits that the independent claims and hence all claims should be allowed.

### **Conclusion**

For all of the above reasons, Applicant submits that the claims define novel structure under §102, which novel structure is unobvious and thus patentable under §103. Accordingly Applicant respectfully requests reconsideration and allowance of the claims.

### **Conditional Request For Constructive Assistance**

Applicant submits that she has a novel and unobvious invention. She has made a diligent effort to amend the claims of this application so that they recite novel features of her invention, which she submits are unobvious. If, for any reason, the Examiner believes that the claims of this application are not yet in full condition for allowance, Applicant respectfully requests the Examiner's constructive assistance and suggestions pursuant to the spirit of MPEP §706.03(d) and §707.07(j). This will enable the undersigned to place this application in fully allowable condition

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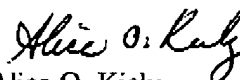
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as soon as possible and without the need for further proceedings.

Very Respectfully,

  
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Certificate of Facsimile: I certify that on the date below, this document and referenced attachments, if any, will be faxed to the central fax number of 571-273-8300 to the United States Patent and Trademark Office "Commissioner for Patents" Arlington, Virginia 22313.

2009 January 16,

  
Alice O. Kiely